

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: ) Case No. 1:17-md-2804  
)  
NATIONAL PRESCRIPTION )  
OPIATE LITIGATION )  
)  
) Wednesday, August 30, 2023  
)

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS

*HELD VIA ZOOM VIDEOCONFERENCE*

BEFORE THE HONORABLE DAN AARON POLSTER

UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography; transcript  
produced with computer-aided transcription.

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11

ALSO PRESENT:

12

Corey McCardle, Courtroom Deputy  
Carrie Roush, Law Clerk  
David Cohen, Special Master  
Michael Borden  
A. Scott Loge

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1 WEDNESDAY, AUGUST 30, 2023

2 - - -

3 (Proceedings commenced at 12:03 p.m.)

4 - - -

5 THE COURT: Good afternoon, everyone.

6 This is a status call in the Opiate MDL case. I think  
7 it's MDL 2804. We got representatives of the PEC; the two  
8 remaining PBMs, Express Scripts and OptumRx; there may be  
9 representatives of attorneys general, I'm not sure; special  
10 master; my staff; and we have a court reporter.

11 At the last conference I had given the parties some  
12 period of time to try and work with Special Master Cohen to  
13 hopefully come to some agreement about a bellwether  
14 selection process. Parties worked hard, were not able to  
15 come to an agreement. I requested status reports, which  
16 I've received. So I believe I had told the parties that if  
17 they couldn't come to an agreement, either I would come up  
18 with a plan myself and implement it, or I would just say,  
19 well, I'm done with the PBMs, I'm going to ask the JPML to  
20 remand all these cases, however many there are, and to all  
21 my colleagues around the country, and whatever they do, they  
22 do. I decided that would not be efficient, that wouldn't  
23 advance things at all, so I'm going to -- I've given some  
24 thought, and I'm going to tell everyone what I'm going to  
25 do, and this will be the procedure.

1 I think we need four bellwethers. I think the  
2 plaintiffs had suggested four, the defendant had suggested  
3 two. I think two is too few. I want to make sure that we  
4 have enough that if one or two settle or somehow don't go  
5 forward, that what I've learned is we need an active  
6 litigating track, an active settlement track, and keep both  
7 trains running, and I think I've done that pretty well over  
8 five-plus years.

9 So I think that the way I'd like to do it is this.  
10 The defendants will select and identify four cases, and the  
11 plaintiffs will identify four cases, and then -- and to  
12 ensure that we end up with four cases from different  
13 circuits, because I'm going to let the defendants strike two  
14 of the plaintiffs' four and the plaintiffs strike two of the  
15 defendants' four, and so we will end up with four cases, two  
16 of them being chosen by the defendants jointly. Two --  
17 well, I mean -- or I guess if, again, Optum can pick two --  
18 OptumRx can pick two and Express Scripts two, however you  
19 want to do it, we have four and the plaintiffs strike two  
20 and vice versa, so we'll have four cases.

21 I want them all from different circuits. And I think  
22 the easiest way to do that is that defendants will pick  
23 their four cases, and no more than one per circuit from  
24 Circuits 1, 3, 5, 7, 9, and 11. And the plaintiffs will  
25 pick their four cases, no more than one per circuit, from

1 Circuits 2, 4, 6, 8, and 10. And that way we'll end up with  
2 four cases from four different circuits. And we'll go  
3 forward with those.

4 Now, in terms of amending complaints, the Sixth  
5 Circuit has clearly said that because of my initial order  
6 that plaintiffs could amend complaints if a case is selected  
7 as a bellwether. I will permit the plaintiffs to amend the  
8 complaint in the four cases that we end up -- any of the  
9 four. So there's no point amending beforehand or  
10 unnecessarily because we're only going to end up with four.  
11 So the plaintiffs may amend their complaints in the four  
12 cases they pick.

13 So that means that the plaintiffs can -- you know,  
14 when they're selecting cases, they can select cases that  
15 currently have PBMs in there or not because they'll be able  
16 to add PBMs in those cases, and for that matter, the same  
17 with the plaintiff -- defendants.

18 And I don't know -- have the plaintiffs discussed what  
19 causes of action you're going to focus on?

20 I mean, we've had some cases with public nuisance,  
21 some with RICO, some with both. Have you thought about what  
22 you want to include?

23 MR. RICE: Judge, I...

24 (Unclear speech; clarification requested by  
25 court reporter.)

1 THE COURT: Hold it.

2 Joe, you're breaking up. I can't hear. I'm sure the  
3 court reporter can't.

4 MR. RICE: Joe Rice for the PEC.

5 We have talked about it, and we believe that we need  
6 to look at the circuits that we're going to have the cases  
7 in to make that final --

8 THE COURT: Okay. That's fine.

9 Well, again, you know, you can amend the complaint of  
10 any case that we end up with a bellwether, so any -- one,  
11 two, three, or four cases. You know, you can include, you  
12 know, the conduct as PBMs and/or conduct as pharmacies if  
13 you wish, all right?

14 So, again, the Sixth Circuit has been clear that  
15 because of my initial order that plaintiffs could amend  
16 complaints that had -- that were selected as bellwethers,  
17 and as long as there hasn't been -- there had been little or  
18 no work done on any case. So, in other words, don't select  
19 a case that's been actively litigated, all right, because  
20 you can't -- you know, if you do, then you're not going to  
21 be able to amend that case, all right? Because the parties  
22 have already started doing a lot of work on the complaint  
23 that exists.

24 So I'm not -- if you -- I'm not saying you can't pick  
25 a case that's being actively litigated, although I -- other

1       than the pharmacy bellwethers, I don't think there's any  
2       case currently in federal court -- I'm not aware of any case  
3       in federal court that's being actively litigated. There  
4       have been some cases that -- after the JPML stopped  
5       assigning cases to me that are on the dockets of other  
6       federal judges, but I'm not sure there's been a lot of  
7       active litigated.

8               All right. So you tell me how long you want for this  
9       process, all right? The first step obviously is each side  
10      picking their four cases.

11             So you tell me it's -- you know, how much time is  
12      reasonable, you know, what are -- what are the plaintiffs  
13      suggesting, what are the defendants suggesting for time  
14      there.

15                     MR. BOONE: Your Honor, this is Brian Boone  
16      for OptumRx.

17             I guess I just have a question about the process. Are  
18      you envisioning that the parties will select the bellwethers  
19      and then the PEC or the plaintiffs will generally -- will  
20      move to amend complaint, or are you ruling right now --

21                     THE COURT: No. I'm ruling right now, Brian.  
22      I mean, the Sixth Circuit's already dealt with this. We're  
23      not reinventing the wheel. The Sixth Circuit has already  
24      held in a formal opinion that I -- they recognize my initial  
25      order that said that plaintiffs could amend cases that are



1 bellwethers, and they said that's fine so long as the case  
2 hasn't had a lot of active litigating and the parties have  
3 relied on a complaint that was filed. So that's already  
4 ruled. So I'm simply following what the Sixth Circuit has  
5 directed.

6 So the plaintiffs are going to pick four, and you're  
7 going to pick four. So my question is how long will it --  
8 should we allow for each side? Obviously you get the same  
9 amount of time. You tell me.

10 MR. COOPER: Your Honor, this is Jon Cooper  
11 for Express Scripts.

12 I have another question about this process. I think  
13 Your Honor indicated that you would like the PBMs to choose  
14 potential bellwethers from the odd-numbered circuits, but --

15 THE COURT: Right.

16 MR. COOPER: -- there are only currently about  
17 80 cases in the MDL against PBMs. I don't believe there are  
18 any even in, for example, the Seventh or the Ninth circuits.

19 THE COURT: But, again, you can pick a case,  
20 all right? It doesn't -- I mean, presumably --

21 MR. COOPER: But how can we -- sorry, Your  
22 Honor.

23 THE COURT: Presumably --

24 Jon, look. You pick a case, and if the plaintiffs  
25 don't strike it -- all right. Hypothetically, let's just

1 say you pick a case from the First and the Third and the  
2 Fifth and the Seventh, and the PBMs aren't in it, okay?  
3 Fine. Well, the plaintiffs are going to have to put you  
4 into one of the -- they can strike two, but they're going to  
5 have to put you in the other two.

6 MR. COOPER: Your Honor, it doesn't make any  
7 sense to me to require us to choose cases to get sued in  
8 when we're not currently sued, so --

9 THE COURT: Well, then fine. Then don't.  
10 Then take -- you know, if you're not in one of those -- I  
11 got to think you're in at least four of the odd circuits,  
12 right? 1, 3, 5, 7, 9, 11. That's six odd circuits. Are  
13 you in at least four of those circuits?

14 MR. COOPER: I don't believe we're in the  
15 Seventh, the Ninth, or the Eleventh. I'd have to go check  
16 on some of the others.

17 MR. BOONE: I think that's right.

18 And, Judge Polster, I understand your ruling. I just  
19 want to get it on the record that under the rules we would  
20 be entitled to an opportunity to oppose any amendments. I  
21 think even in your most recent --

22 THE COURT: Fine. I mean, I'm going to deny  
23 it because I'm just following the Sixth Circuit. So fine,  
24 all right?

25 MR. BOONE: Understood. I just want to create

1 a record on that point.

2 THE COURT: All right. Fine. You can object.  
3 You want to file it, go ahead. I'm following the Sixth  
4 Circuit. And if you want to -- I'm following exactly what  
5 the Sixth Circuit said I'm allowed to do.

6 Now --

7 MR. BOONE: May I just make one other comment?

8 I just want to be clear that I felt that this is what  
9 you had contemplated in your most recent ARCOS order where  
10 you said, I think, that you would rule on motions to amend,  
11 quote, based on federal rules of civil procedure, the  
12 arguments and case law provided in the parties' briefs, and  
13 the guidance provided by the Sixth Circuit in the  
14 above-cited mandamus rulings. And so that seemed to us that  
15 you were contemplating an opportunity for us to brief and,  
16 in our case, oppose amendments. We think we're entitled to  
17 that opportunity.

18 MR. COOPER: And, Your Honor, Express  
19 Scripts --

20 (Unclear speech; clarification requested by  
21 court reporter.)

22 THE COURT: Well, I think you -- I mean, I'm  
23 not going to go down -- I mean, it seems crazy to go down  
24 this whole road, and then we have a lot of litigation on  
25 amending complaint.

1 MR. COOPER: Well, Your Honor --

2 THE COURT: And, conversely, to say that the  
3 plaintiffs should go ahead and amend complaints in hundreds  
4 of cases, that doesn't make sense because I -- again, I'm  
5 going to follow the Sixth Circuit, which says I got to --  
6 you know, if it's bellwethers, you can do it.

7 MR. BOONE: But I think the Sixth Circuit --  
8 with respect, Your Honor -- also said you have to look at  
9 each case individually and not in the aggregate, which I  
10 think you're kind of doing here.

11 THE COURT: No. I'm doing it. It can't be a  
12 case that's being actively litigated because that wouldn't  
13 be fair. If you've all spent, you know, six months  
14 litigating a complaint, it wouldn't be fair to suddenly  
15 present you with a new case. So we're not doing that.

16 MR. BOONE: Understood. I understood your  
17 ruling.

18 THE COURT: All right. Well, look --

19 MR. BOONE: I just wanted to make the record.

20 (Unreportable crosstalk.)

21 MR. BOONE: And we're going to reserve our  
22 rights --

23 THE COURT: Go ahead. If you want to file  
24 your motions, you can file your motions, but I --

25 All right. Where do we --

1 MR. BOONE: I mean, look, as you've seen in  
2 our status updates, these proposed amendments are going to  
3 be later than late by any standard, we think we have real  
4 grounds for opposing them and we're entitled to have that  
5 opportunity. I understand your ruling --

6 THE COURT: Look. Look. Do what you want,  
7 all right? Do what you want. You know what I'm going to  
8 do. I'm going to follow the Sixth Circuit, all right? You  
9 want to make the record, make the record. I will do what  
10 the Sixth Circuit has told me I'm permitted to do, all  
11 right? And they're not going to reverse themselves on the  
12 second case. You understand that. But you want to do it,  
13 do it.

14 Let's go back -- how do we do this selection?

15 I thought this was a good way to ensure we get cases  
16 from different circuits. I don't know that cases in -- half  
17 the --

18 MR. COOPER: Given the limited number of cases  
19 against the PBMs in the MDL, Your Honor, that's one of the  
20 reasons why we thought this amendment issue needed to be  
21 resolved. It doesn't -- at least to Express Scripts -- make  
22 sense to choose a bellwether from a circuit or a  
23 jurisdiction where there are no cases against the PBMs.  
24 It's not going to serve a bellwether function, it's not  
25 going to help resolve any cases. And so if we knew the full

1 universe, that would be one thing, but if we're using just  
2 the cases currently in the MDL, it should --

3 THE COURT: Mr. Cooper, I mean -- you're not  
4 going to trap me into letting the plaintiffs amend every  
5 case because I know the Sixth Circuit's not going to allow  
6 that.

7 MR. COOPER: And --

8 THE COURT: So you tell me what you want --

9 MR. COOPER: Well, if cases can't be amended,  
10 then we should just use the universe of cases that --

11 THE COURT: We know that the Sixth Circuit has  
12 said that cases can be amended if they're bellwethers and  
13 they haven't been actively litigated. I know that, and you  
14 know that.

15 MR. COOPER: Right. But, Your Honor, there's  
16 no reason to have a bellwether if there are no other cases  
17 it's serving as a bellwether for. If the vast majority of  
18 cases can't get amended and we have to be limited primarily  
19 to the cases already in the MDL, we should focus on those.  
20 And those -- it doesn't make sense to choose bellwethers  
21 outside of the ones that are already pending. That won't  
22 help resolve the other ones that are pending.

23 MR. BOONE: And I agree --

24 THE COURT: And so you're saying -- you're  
25 saying we're limited to the 80 cases?

1 MR. COOPER: Correct.

2 THE COURT: That's what you're saying. Well,  
3 I don't think we are.

4 What are the plaintiffs suggesting?

5 This is why you were supposed to work all of this out.  
6 And what I don't know is why these two defendants, out of  
7 all the other defendants, were unwilling or unable to work  
8 out a bellwether process.

9 MR. COOPER: Your Honor, we've asked the  
10 plaintiffs --

11 THE COURT: Your Honor --

12 MR. COOPER: -- repeatedly to provide a  
13 proposal on amendments so we could understand the universe  
14 of cases. The concern is we can't choose a bellwether  
15 properly if we don't know what it's serving as a bellwether  
16 for. And so we've asked the plaintiffs repeatedly to  
17 provide a proposal on what cases they would seek to amend to  
18 add claims against the PBMs, and they haven't done that.  
19 And that's sort of been the sticking point on this.

20 On the bellwethers, we actually thought we were pretty  
21 close. In our letters last week, both sides had agreed to  
22 two bellwethers, and it was just a question of sort of  
23 the -- in the status report they changed tunes, and they're  
24 now seeking four. And I understand Your Honor has ordered  
25 four. But what we need to know is the universe of cases

1 because I don't see how we can choose cases where we're  
2 not defendants and be asking the plaintiffs to ask  
3 defendants -- that just doesn't make sense to us or our  
4 client.

5 MR. BOONE: Your Honor, this is Brian Boone  
6 for OptumRx.

7 Is that we were ready to pick bellwethers, two  
8 bellwethers back in the spring, which is what, Judge  
9 Polster, you had suggested, and then the PEC said let's  
10 stop. And they didn't engage for however long. So it's not  
11 true that we have been delaying or trying to delay. We were  
12 ready to do it. The PEC wasn't ready to do it and said so,  
13 and then it just kind of died for a while.

14 MR. WEINBERGER: So, Your Honor --

15 This is Pete Weinberger for the plaintiffs.

16 What the defendants are forgetting is that the issue  
17 of amending complaints in the MDL has been an issue that  
18 we've been discussing for a long time. And we -- we agree  
19 that we need to comply with Sixth Circuit in terms of cases  
20 within the MDL. The alternative is is we don't -- you know,  
21 we filed a bunch of cases outside the MDL, which I don't  
22 think is -- I think we all agree is not efficient. And so,  
23 you know, we're prepared to follow your directive to --

24 THE COURT: I'll tell you what we're going to  
25 do then, since the defendants are -- this is -- this is



1 because of what the defendants are doing, I will...

2 So we got 80 cases now with the PBMs, right? All  
3 right?

4 MR. BOONE: It's --

5 MS. CICALA: The number may be larger than  
6 that at this point, Your Honor.

7 THE COURT: How many are there?

8 MS. CICALA: Apologies. This is Joanne Cicala  
9 speaking.

10 I don't have a current count, but I'm quite certain  
11 it's north of 80.

12 THE COURT: Well, I guess what I need to do  
13 is -- maybe the fairest thing is to do this, is permit the  
14 plaintiffs to -- I mean, what the defendants are pushing for  
15 is a process that the plaintiffs are going to identify the  
16 universe from which bellwethers are selected. You want me  
17 to limit those to what they select, and I'll tell you they  
18 can amend two cases per circuit. So that's two times 11 is  
19 22, and we'll pick among those 22. That's what you want,  
20 then -- well, that's the 22, and then we'll go back to the  
21 circuits things. Then there will be two and, you know --

22 MR. BOONE: Your Honor, this --

23 THE COURT: Or -- so we've got those or, quite  
24 frankly, I'll allow them to amend, you know -- I don't know.  
25 I mean, it doesn't make sense to amend every one of these --

1 every 80 cases, but you want them to do it, fine.

2 I'm trying to limit the -- save people time but have  
3 enough cases that you can select, so --

4 (Unreportable crosstalk.)

5 THE COURT: Should have the plaintiff pick --  
6 they can amend two cases per circuit, so that's 22 cases.  
7 So if they can amend the case -- two cases in each circuit,  
8 the two cases can be ones that do have PBMs now or don't.  
9 And that will be the universe we pick. Or if the defendants  
10 select one of the other -- say we have a hundred cases, not  
11 80, say we have a hundred cases, if the defendants choose  
12 among their -- you know, their cases ones that haven't been  
13 amended, well, then the plaintiffs can amend those when  
14 they're picked.

15 MR. BOONE: Your Honor, this is Brian Boone  
16 for OptumRx.

17 And I don't want to beat a dead horse here, but we do  
18 think we're entitled to brief proposed amendments and oppose  
19 them if we would so choose, and we would so choose because  
20 they would be late by any standard, and --

21 THE COURT: Well, you're going to lose that,  
22 okay? You're not going to lose that. The Sixth Circuit...

23 Mr. Boone, you can brief anything you want. The Sixth  
24 Circuit has already ruled that they're not late. But you've  
25 got to -- you got -- I'm not going to fall into your trap.

1 I see exactly what you're doing. I'm a little smarter than  
2 that.

3 MR. BOONE: Your Honor, I'm not trying to set  
4 a trap. I'm --

5 THE COURT: Well, you were -- yes, you are.  
6 Yes, you are, and I'm not falling into it, all right? I've  
7 been around the block enough times.

8 Now --

9 MR. BOONE: Your Honor, if I can --

10 THE COURT: You're either going to give me a  
11 process that you think is fair, or I will say you've waived  
12 your right to give me a process that's fair, all right?

13 So how much time -- I'll give -- you want ten days,  
14 I'll give you ten days -- ten days to produce to me a  
15 process that is fair in terms of selecting bellwethers and  
16 amending complaints that comports with the Sixth Circuit  
17 ruling, or I will hold that you've waived it. All right?

18 MR. BOONE: Your Honor, if you're going to  
19 give us only ten days, we'll take the ten days, but I don't  
20 think it would be appropriate for you to then say that we  
21 would waive any rights.

22 THE COURT: Oh, yes, you've had -- you've had  
23 a couple months. What I want is you -- you give to me a  
24 process that is fair for selection. And, again, I want to  
25 end up with four cases, and I want to give, you know, each

1 side -- you know, each side the equal -- equal number of  
2 strikes, all right? So that's -- any proposal has to have  
3 that, all right?

4 But you give me -- give me a proposal that's fair in  
5 terms of amending -- amending complaints, choosing these  
6 cases and so everyone knows what is the universe from which  
7 you are to identify your four cases, okay? That's fair.  
8 But you got to give it to me, or else I will have to -- I'll  
9 deem that you've waived it. If you don't give me a process,  
10 you know, in ten days that meets this, then I will issue an  
11 order that you've waived it.

12 MR. BOONE: And when you say we waived it, you  
13 mean -- what would we have waived? I just want to make sure  
14 I --

15 THE COURT: Well, waived your right to object  
16 to anything that I've come up with.

17 MR. BOONE: Including amendments? I just want  
18 to make clear.

19 THE COURT: Absolutely. Absolutely.  
20 Absolutely.

21 MR. BOONE: Your Honor, that would not be  
22 appropriate.

23 The only other thing I was going to say about the --

24 THE COURT: I suggest you not tell me what is  
25 appropriate, Mr. Boone. You want to object to it, you want

1 to file whatever you want, but I know what's appropriate.  
2 I'm giving you the opportunity.

3 MR. BOONE: I'm not trying to be  
4 disrespectful, Your Honor. I just want to create a record.

5 THE COURT: All right. Create the record.

6 MR. BOONE: I know that you've invoked the  
7 Sixth Circuit a few times. The Sixth Circuit has never  
8 looked at PBM cases in 2023, so it's not true that the Sixth  
9 Circuit has decided the issues that we would raise in our  
10 oppositions to amendments.

11 And I just want to --

12 THE COURT: If you want to tell the Sixth  
13 Circuit why somehow PBMs are different than every other  
14 defendant in terms of this kind of a ruling, be my guest. I  
15 don't think you'll get far.

16 So, again, we've got ten days. And let's just make  
17 it, you know, 4:00 on Monday, September 11th, all right?

18 And so you're to file -- the PBMs -- the PBMs are to  
19 file your proposal for selecting bellwethers and amending  
20 complaints that you think -- that you think is fair that  
21 gets us -- you know, you're going to pick four, the  
22 plaintiffs are going to pick four, you're going to strike  
23 two of theirs, you're going to strike -- they're going to  
24 strike two of yours, and we're going to end up with cases  
25 from four different circuits. All right? I think we all

1 agree on, you know, that they should be among different  
2 circuits. All right?

3 And you want to plan where you know in advance -- I  
4 mean, what the -- you know, what the case -- you know, what  
5 are you choosing from? All right? So, all right, I accept  
6 that principle, that makes sense. You come up with a plan  
7 to, you know, how it works and get -- and file it by 4 PM,  
8 Monday, 9-11. And if it -- and I'll -- and then I guess  
9 I'll give the plaintiffs a few days to respond to it, all  
10 right?

11 I think three days is fine. 4 PM, Thursday, 9-14, the  
12 plaintiffs can file any response. And then sometime the  
13 following week I will issue an order with what we're going  
14 to do. And if the defendants have a very good plan, I'd  
15 like to follow all or much of what they've got. And if you  
16 have nothing, well, obviously you got nothing.

17 MR. COOPER: Your Honor, for Express Scripts,  
18 we'll definitely coordinate and work with Optum to come up  
19 with the proposal you're asking for. I do want to note,  
20 though, that we don't agree, we do object that it makes  
21 sense to have four bellwethers, and also that it makes --  
22 necessarily makes --

23 THE COURT: Well, fine. I'm saying I don't  
24 want two. I want four. So you're not going to --

25 MR. COOPER: I understand.

1 THE COURT: Fine. I understand you wanted  
2 two, and I'm thinking it's better to have four. It  
3 doesn't -- it doesn't change the process. That's just  
4 numbers. The key is -- the key is a proposal for dealing  
5 with amendment -- amending complaints so that everyone knows  
6 what the cases are from which you're choosing. It doesn't  
7 matter if you're choosing two or four, it's the same thing.

8 MR. COOPER: Right.

9 And, Your Honor, to that point I want to make it  
10 clear. Two points on that. One is it's not clear to us  
11 that it makes sense to have bellwethers from four separate  
12 circuits given the concentration of the PBM cases in the  
13 MDL. I mean, they're primarily concentrated, for example,  
14 in the Fourth Circuit. So it's not clear to us it makes  
15 sense to have four from separate circuits, especially from  
16 circuits where there are zero cases against the PBMs  
17 pending.

18 And on the amendment point, you know, we'll look at  
19 it, but it doesn't make sense to us to be amending cases  
20 beyond the pending cases to create new bellwethers in  
21 completely other jurisdictions. So we'll certainly look at  
22 this issue, but I want to note that it doesn't seem to make  
23 sense as of -- to serve as a bellwether to have a case in a  
24 jurisdiction or a circuit where there are no other pending  
25 cases. It's not going to serve any bellwether function.

1           So, you know, I understand the point about needing to  
2           amend a complaint to clarify which claims or whatever are  
3           going to be pursued, that can be done within the current set  
4           of 80 pending cases, there's no need to go beyond those.

5           THE COURT: Well, if the plaintiffs are going  
6           to pursue public nuisance, Mr. Cooper, that's different in  
7           every state. Every state has its own public nuisance law.  
8           And I haven't heard the plaintiff say they're not using  
9           public nuisance. If it's just RICO, quite frankly doesn't  
10          matter if they're -- my guess is RICO law is pretty darn  
11          similar among the circuits. The public nuisance is a state  
12          law, state cause of action.

13          MR. COOPER: And I understand that, Your  
14          Honor.

15          THE COURT: So you're saying you don't need  
16          different circuits. What do the plaintiffs think? Maybe we  
17          don't care, have them all from the same...

18          The problem is if you're going to pursue public  
19          nuisance, you certainly don't want them all from the same  
20          state. That doesn't accomplish anything.

21          MR. COOPER: I understand that, Your Honor.

22          And, you know, there are -- within the 80 pending  
23          cases, they're not all in one state, they are I think from  
24          eight or nine states. So you can still get a variety of  
25          states and potentially a variety of circuits. I just don't



1 know if it will end up being four separate circuits. So we  
2 can certainly look at this issue and come back to you with a  
3 proposal. But, you know, we just want to make clear that it  
4 doesn't make sense, to us at least, go outside the pending  
5 cases for amendments.

6 MR. BOONE: So this is Brian Boone again for  
7 OptumRx.

8 We'd certainly agree with that. But, again, just to  
9 be clear, we don't think there should be any amendments  
10 because they're impossibly late, and so we plan to object.  
11 We'll work --

12 THE COURT: Then let's not waste time. If  
13 you're going to -- if you're not even going to give me  
14 anything because you're going to say the plaintiffs can't  
15 amend anything, then there's no point going through this  
16 exercise.

17 MR. BOONE: We'll talk to Express Scripts.  
18 I'm not -- we'll coordinate and we'll get back to you by --

19 THE COURT: Will the plaintiffs care -- maybe  
20 take them all from one circuit. I don't care. We need to  
21 get started here.

22 The plaintiffs care? Take them -- you know, just pick  
23 from the 80, all right? You know, I don't care about the  
24 circuits. They're all in the same circuit, so be it.

25 MR. RICE: Your Honor, this is Joe on

1       behalf...

2                       (Unclear speech; clarification requested by  
3                       court reporter.)

4                       MR. RICE: The circuits -- we're addressing  
5       two different issues here. Right now we're trying to pick  
6       the bellwethers where the amendment question has been  
7       resolved out of the Sixth Circuit. As you know, we believe  
8       that there's been a state order in place that prevents  
9       plaintiffs from filing any amendments to their complaints  
10      for now or four years while you managed the process with  
11      your manufacturers, distributors, and the pharmacies, and  
12      that has successfully worked. But the plaintiffs have been  
13      waiting for that stay to be lifted so they can file their  
14      amendments.

15                      So that's not before you today, but we do need to  
16      address that in a global MDL process. And we plan to  
17      present that motion once we get the ARCOS data process, they  
18      can give you a full picture. But right now we do believe in  
19      the bellwether selection it should be more than one circuit,  
20      and we should -- you should tell us to designate -- we'll  
21      designate eight cases as bellwethers, we'll pick them from  
22      different circuits. Then the defendants can --

23                      THE COURT: No. You don't need eight. You  
24      need four, they need four --

25                      (Unreportable crosstalk.)

1 THE COURT: -- and we'll get four.

2 MR. RICE: You're going to pick -- you're  
3 going to pick -- okay, we'll pick -- we need to have eight  
4 bellwethers so that they can be amended pursuant to the  
5 Court's previous order and then from those eight strike --

6 THE COURT: Well, we can do that but, you  
7 know, defendants -- I mean, we can do that if the defendants  
8 are pushing me to that, then we'll let the plaintiffs pick  
9 the eight cases, but I would rather, you know, the  
10 defendants meet -- the point is -- the point is this, you  
11 ought to -- you ought to pick the cases that you'd rather be  
12 in if you want, you know, in your pick. Why would you let  
13 the plaintiffs pick all eight? That's what you want?

14 MR. BOONE: This is Brian Boone again from  
15 OptumRx.

16 No, we don't want that, Your Honor.

17 MR. COOPER: Nor does Express Scripts.

18 THE COURT: Well, then --

19 (Unreportable crosstalk.)

20 THE COURT: Then you can pick -- you can  
21 pick --

22 MR. RICE: Judge, this --

23 THE COURT: Maybe we should just go with the  
24 80 we got, all right? And if they're not in every circuit,  
25 so be it. We'll just go with the 80 we've got and, you

1 know --

2 MR. RICE: Judge, the --

3 THE COURT: -- and get -- the 80 we got.

4 So the defendants are going to pick -- you know,  
5 they'll pick four of the 80, and the plaintiffs pick four of  
6 the 80, and then you get two strikes each, and we'll get  
7 four, and the plaintiffs will be able to amend those four in  
8 terms of -- you know, you don't have to add the PBMs,  
9 they're already in, but you could, you know, add or subtract  
10 causes of action and, you know -- obviously we're going to,  
11 you know, sever all other defendants that are in the case  
12 and just try the PBMs, so we'll do -- that's -- you know,  
13 we've always done that. All right. Fine. We'll just go  
14 with the 80 we got, and you all figure out -- you all figure  
15 out how we don't end up with, you know, four Second Circuit  
16 cases because I don't think that's -- that makes sense.

17 So how are you proposing that we -- if we do this, we  
18 just have those 80 and the plaintiffs pick four, defendants  
19 pick four, you do two strikes, how we -- what we do so we  
20 don't have all four cases from the Second Circuit?

21 MR. BOONE: Your Honor, this is Brian Boone  
22 again from OptumRx.

23 I'm happy to talk to the ESS counsel, to Mr. Cooper,  
24 and we can come up with some proposal that we can get back  
25 to you by September 11th. I can't...

1 (Unclear speech; clarification requested by  
2 court reporter.)

3 MR. BOONE: Ever going to agree in proposing a  
4 certain way forward to any amendments, but we can at least  
5 talk through the issues with Mr. Cooper, and we can meet  
6 your deadline of September --

7 THE COURT: All right.

8 Well, I -- I'm just going to cut through this right  
9 now then. I mean, just do it. Just -- you're going to pick  
10 four right now, both sides are going to pick four, and you  
11 pick four out of the 80, and pick four out of the 80, and I  
12 guess the best thing to do -- I guess the plaintiffs should  
13 pick, you know, four different circuits and the defendants  
14 should pick four different circuits. How does that sound?

15 I don't care if they're odd or even, all right?

16 And if there's some overlap, there's some overlap, and  
17 then you do your two strikes and have your four, and I'll  
18 reserve the right -- if I think -- if they all come out in  
19 the same circuit or three of them are in the Second Circuit  
20 and only one is the other and we just have two circuits,  
21 we're going to have to do something. We end up with four  
22 cases in three different circuits, I don't have a -- that  
23 isn't the problem, okay? But I want to have at least three  
24 different circuits in the four, all right?

25 So you all -- how does that sound?

1 MR. BOONE: And, Your Honor --

2 THE COURT: And I'm ruling now that if  
3 plaintiffs -- well, then if the plaintiffs want to amend the  
4 complaints -- all right, I will -- I will -- I mean, I'll  
5 grant the motion for leave to file the amended complaint.  
6 And then if the defendants want to object, they make their  
7 record, they make their record, but I'm quite confident that  
8 this process is following exactly what the Sixth Circuit has  
9 directed. We'll have up to four amended complaints, and no  
10 one is prejudiced because there will not have been any  
11 litigation at all on any of them, so...

12 How long should we -- what's reasonable for each side  
13 to pick its four? How long do you want to pick your four?

14 MR. COOPER: Your Honor, just to be clear,  
15 this is picking from the 80 existing cases?

16 THE COURT: Yes.

17 MR. COOPER: Okay. That's --

18 THE COURT: You pick four of 80, and they pick  
19 four of 80.

20 And, quite frankly I mean, if there's an overlap, it  
21 seems to me that's automatically -- how does that sound? I  
22 mean, if one of your four is one of their four, then that  
23 should automatically be in. Does that seem reasonable?  
24 Shouldn't be striking a case that's -- you know, so --

25 MR. BOONE: Your Honor, speaking only for

1 OptumRx, if we're talking about picking four from the  
2 existing 80 or so cases --

3 THE COURT: There may be a hundred. We're  
4 using 80, but Ms. Cicala said it might be a hundred or more.

5 MR. BOONE: Understood. But if we're talking  
6 about that universe of cases where the PBMs are already  
7 defendants, again, speaking only for OptumRx, I think we can  
8 do it by September the 11th.

9 THE COURT: All right.

10 Express Scripts, can you do it by September 11th?

11 MR. COOPER: I think we can make that work. I  
12 think if possible we'd like to have two weeks, so until the  
13 13th of September.

14 THE COURT: All right. Two days is fine.  
15 That's fine.

16 MR. COOPER: Thank you, Your Honor.

17 THE COURT: 4 PM, the 13th. So by 4 PM, the  
18 13th, each side is to select four of the existing PBM cases  
19 as potential bellwethers.

20 MR. COOPER: And, Your Honor, one other note,  
21 if I may.

22 MR. RICE: Excuse me, Jonathan.

23 Judge, that's each -- therefore, it will be four  
24 separate circuits, and our four will be four separate  
25 circuits.

1                   THE COURT: Right. Right. You won't know  
2                   which ones, and there could be an overlap because you're  
3                   going to do it simultaneously. I want the plaintiffs to  
4                   have four different circuits, I'm not telling them -- it can  
5                   be odd, even, whatever. I want the defendants to have four  
6                   different circuits. And you file -- you know, I guess file  
7                   those. And then...

8                   And, again, it seems to me pretty obvious that if  
9                   you -- you each selected the same case, that should  
10                  automatically be one of the four, do you agree?

11                  MR. RICE: I would think that makes sense,  
12                  Your Honor, if we pick the same case.

13                  MR. COOPER: Your Honor, so I generally agree  
14                  with that in principle, but let me give you a caveat. The  
15                  caveat is this. In order to be able to pick from four  
16                  separate circuits, since so many of the cases are in just  
17                  one circuit, it's quite possible that we -- to be able to  
18                  pick from four circuits, there may be only a single case  
19                  from, say, the fifth circuit. And if -- and so to be able  
20                  to get four circuits, we may have to choose from cases where  
21                  there's only one --

22                  THE COURT: All right. Fine. Fine. I'll  
23                  just -- make sense, but we'll just do this -- you can  
24                  strike -- strike two from the four. All right.

25                  So you'll have your four by 4 PM, 9-13. All right.



1           How long will it take each of you? What's reasonable  
2           to allow for you to decide which of the other side's four  
3           you want to strike?

4                   MR. RICE: Your Honor, this is Joe again from  
5           the PEC.

6           This is moving in a lot of different directions. We  
7           want to move it quickly, but in --

8                   (Unclear speech; clarification requested by  
9           court reporter.)

10                  MR. RICE: In the hurricanes that a lot of our  
11           folks are dealing with in the south, we would ask we'd have  
12           a little more time to select the four bellwethers because we  
13           know -- to PC to talk this through --

14                  THE COURT: All right.

15                  (Unreportable crosstalk.)

16                  THE COURT: They requested two weeks. What  
17           would you like?

18                  MR. RICE: I'm going to let Mr. Weinberger  
19           help me out here. I know we got some people out of the  
20           country that are important to talk to.

21                  How about September 22nd?

22                  MR. WEINBERGER: I think that works, Joe.

23                  THE COURT: All right. Nine additional days  
24           is no problem. The PBMs obviously get the same amount of  
25           time. So we'll make it September 22nd, which is Friday.

1 All right.

2 All right. So the next question is how much time does  
3 each side think is reasonable to do the striking two?

4 Obviously same amount of time for each side.

5 MR. RICE: I would assume we can do that  
6 within seven days of the 29th, if that's reasonable to the  
7 PBMs.

8 THE COURT: Yeah. What are you -- Jonathan  
9 and...

10 MR. BOONE: Brian.

11 THE COURT: Brian, yes. Sorry. I'm looking  
12 on the screen.

13 They propose the 29th. That's a week. Do you want a  
14 little longer? I mean -- you know, you tell me.

15 MR. COOPER: I think a week --

16 I'm sorry. Go ahead, Brian.

17 MR. BOONE: I was going to say --

18 This is Brian Boone for OptumRx.

19 I was going to suggest maybe two weeks for that  
20 process.

21 THE COURT: All right. I mean, and that --  
22 that's -- I want to be fair to both sides. So two weeks  
23 would be like October 6th. 4 PM, October 6th. Okay. Okay.

24 So then we'll have our four. So --

25 MR. RICE: Your Honor, this is Joe. And I

1 apologize to the -- since we are on the record with a court  
2 reporter, I do want to make it clear that the MDL PEC has  
3 been in a stay order for five years in allowing our clients  
4 to amend cases, and we do plan to bring a motion unrelated  
5 to the bellwether selection to be allowed to amend cases.  
6 We understand there may be opposition for one or more  
7 defendants, but we do want to be clear that we see this as  
8 two entirely different processes.

9 The bellwether process you've spoken to, but as far as  
10 the overall amendment process, we need to bring that forward  
11 because in the absence of having the ability to do that, we  
12 need to notify our clients that they would need to file new  
13 lawsuits in order to pursue the defendants that they did not  
14 name as this new ARCOS data information and other facts that  
15 we've learned in --

16 THE COURT: I'm not going to deal with that  
17 now. And I -- whole different issue, and every defendant in  
18 the country is going to be opposing that, and I have no idea  
19 what I'm going to do. On these bellwethers I will -- I will  
20 now -- I will give leave for the plaintiffs to file proposed  
21 amended complaints for any of the four, all right?  
22 Defendants want to -- then you can file the amended  
23 complaints so everyone can see it. And if the defendants  
24 want to file objections to those amended complaints, then  
25 they can do so, all right? That's how we'll proceed.

1           So those four cases that we end up with, the  
2           plaintiffs have leave to file the proposed amended  
3           complaints, file them. And defendants want to file  
4           objections, they may. But I -- I believe this is exactly  
5           the process the Sixth Circuit has already approved. So  
6           we'll be proceeding on those four cases.

7           And my present thought is it's more efficient for me  
8           and my team to deal with the motions and discovery than to  
9           send these out to four different judges around the country  
10          who are going to be really upset if they get them, so I'll  
11          probably just do that.

12          Now, obviously defendants may also file motions to  
13          dismiss, you know, if they think there are threshold legal  
14          issues after we determine what the case is. There's no  
15          point filing it if there's an amended complaint, we have  
16          to -- and there's an objection, I'll have to rule on the  
17          objections. But once -- once I determine what the complaint  
18          is, if defendants have what they think is a threshold legal  
19          issue that can be addressed just on the -- on the face of  
20          the complaint, obviously defendants can file whatever  
21          motions they want.

22          And what I'll direct the parties to do, once we  
23          determine what the complaints are for these four cases, is  
24          to work with Special Master Cohen and try and develop a  
25          litigating schedule for these cases. Don't bother with a

1 trial date because I'm not going to be the one trying these  
2 cases. But for discovery, dispositive motions, what we've  
3 done with all the other bellwethers. And if parties can't  
4 agree, have a disagreement, I'll do what I've done in the  
5 past, and I've done it myself. But generally the parties  
6 have been able to do that. But there's no point doing it  
7 now before we know exactly what the complaints are.

8 And, again, if -- my objective is to end up with four  
9 cases in at least three different circuits because I think  
10 that makes sense. If we don't have that, then we'll have to  
11 collectively figure out what to do.

12 All right. So --

13 MR. BOONE: Your Honor --

14 This is Brian Boone again for OptumRx.

15 And you mentioned Special Master Cohen. I know that  
16 he relayed to you that we wanted to raise an issue about an  
17 e-mail that he sent us --

18 THE COURT: Yeah.

19 MR. BOONE: -- on Monday.

20 And -- and I don't know if you've seen the e-mail that  
21 we sent to Special Master Cohen.

22 THE COURT: Yeah. I read it. I saw it.

23 MR. BOONE: Yeah.

24 And so it raises serious questions about his  
25 impartiality vis-à-vis the PBMs. He said in his -- he said

1 a few things in his e-mail. By the way, he also said that  
2 there should be four bellwethers to increase settlement  
3 pressure or the possibility of a global resolution. But he  
4 also said that -- and I'm quoting -- claims against the PBMs  
5 as mail-order pharmacies will show how much PBMs knew, and  
6 they knew a lot.

7 There is no evidence in the record on that score, and  
8 no discovery in the MDL or any other opioid case about  
9 OptumRx's mail-order pharmacy. And he's wrong on the  
10 merits, but we haven't even had a chance to make that  
11 argument in briefing or otherwise, and yet the e-mails  
12 showed that Special Master Cohen has already prejudged the  
13 merits. He says they knew a lot. That is improper by any  
14 standard. We think that Special Master Cohen should recuse  
15 from PBM-related cases and proceedings.

16 THE COURT: Well, that isn't going to happen.  
17 All right? You know, he sent something that -- it showed --  
18 may have shown his thought at the moment, doesn't in any  
19 way, shape, or form indicate that he's biased or prejudged  
20 anything. All right? No one has a clue what the evidence  
21 is. All right? I don't.

22 I mean, the PBMs have argued that they've been part of  
23 the solution, not the problem, and they should be  
24 plaintiffs, not defendants, all right? The plaintiffs have  
25 a different opinion. I don't know what the facts are.

1 Special Master Cohen doesn't know what the facts are. We're  
2 trying to come up with -- you know, with a fair system. All  
3 right? He hasn't prejudged anything.

4 And ultimately every -- every significant decision in  
5 this MDL is mine, all right? If there's a discovery ruling  
6 that he makes and the defendants object, they appeal it to  
7 me. I've got one right now, all right? I've generally  
8 upheld his rulings, I have sometimes reversed them. That's  
9 how it works. Same way if it's a magistrate judge, the buck  
10 stops with me, and I make my own decision.

11 So Special Master Cohen, I'd like to remind you, was  
12 recommended by the defendants initially five-and-a-half  
13 years ago. The plaintiffs as well, but by the defendants,  
14 okay? So the defendants recommended him, and I think the  
15 record has demonstrated over the last five-and-a-half years  
16 he has worked incredibly hard and fairly and has advanced  
17 this MDL beyond any -- what anyone -- anyone could measure.

18 So he's not recusing himself.

19 MR. BOONE: And just --

20 MR. COOPER: Your Honor --

21 MR. BOONE: -- for the record, OptumRx wasn't  
22 part of the process that selected --

23 THE COURT: Well, fine. But all the other  
24 defendants were. Okay? The record is clear on that.

25 MR. COOPER: And, Your Honor, for Express

1       Scripts, a few things.

2               One, I also believe that Express Scripts was not part  
3 of that decision, but more fundamentally, we respectfully  
4 disagree with your view of this e-mail. I want to make  
5 clear for Express Scripts, we think this does show that  
6 Special Master Cohen has prejudged some of these issues, at  
7 least with respect to Express Scripts and the PBMs. So we  
8 do believe recusal would be appropriate. If Special Master  
9 Cohen doesn't recuse, we are looking actively at the facts  
10 and the law in this issue, and we may need to take further  
11 steps. We don't want to be hasty about it, but I've never  
12 seen an e-mail like this from a judicial officer, it raises  
13 very serious concerns in our minds and --

14               THE COURT: Well, first of all, it was sent by  
15 mistake, all right? It's someone's thoughts at the moment.  
16 You have no idea what's ever in my mind. All right,  
17 Mr. Cooper? Okay? Or what's in your mind, okay?

18               First of all, coming up with what's a fair bellwether  
19 process, obviously the objective is you need an active  
20 litigating track and an active settlement track. That's  
21 what's worked, all right? No one wants to try all four of  
22 these bellwethers or the 80 cases. No one has the time,  
23 money, or resources to try them. Everyone knows I tried one  
24 of these bellwethers. The millions and millions of dollars  
25 it takes and a huge amount of court resources. The whole



1 point is maybe you try one or two, maybe you don't have to  
2 try any, in the course of the discovery you get the facts,  
3 all right?

4 Again, the defendants have -- PBMs have said, hey,  
5 we've been part of this solution, we should be plaintiffs  
6 here. You know, plaintiffs disagree. I don't know. My  
7 guess is the truth's somewhere in the middle, okay? You  
8 probably got some good arguments, they've got some good  
9 arguments. So --

10 MR. BOONE: Your Honor --

11 THE COURT: Picking a number suggesting that  
12 it's better to have four than two, I mean, it puts pressure  
13 on both sides to settle. Settlement pressure doesn't -- you  
14 know, just doesn't work on one side, it's both sides. So --  
15 and speculating on what people knew or didn't know, all  
16 right, doesn't -- in my view, it shows...

17 Let's put it this way. It's up to Special Master  
18 Cohen whether he recuses himself. All right? It's not up  
19 to me.

20 MR. BOONE: Your Honor, Brian Boone again for  
21 OptumRx.

22 I agree with what Mr. Cooper said. OptumRx is also --

23 (Unreportable crosstalk)

24 MR. BOONE: I think I said earlier that I  
25 think the e-mail raises serious concerns about Special

1 Master Cohen's impartiality. If I'm being candid, I think  
2 it pretty well shows that he has picked a side and he should  
3 recuse, and if he does not, then we'll look at our options.

4 THE COURT: All right. Look at your options,  
5 okay? But --

6 MR. FARRELL: Judge, this is Paul Farrell. Do  
7 you mind if I make a statement?

8 THE COURT: No. That's fine, Paul.

9 MR. FARRELL: I want to point out just a  
10 couple of things is...

11 Number 1, the PBMs have been part of the discussion of  
12 this court since as early as 2018 when we held meetings in  
13 the basement of Mr. Weinberger's office where I believe you  
14 were present, where we discussed the formularies and  
15 injunctive relief. So even though Express Scripts wasn't  
16 there, even if the Optum wasn't there, this court for the  
17 past five years has handled a variety of issues and is --  
18 and has been embedded with certain information.

19 So for anybody that's been actually litigating this  
20 for the last five years, you can ask either side, I don't  
21 think anybody would say that Mr. Cohen or this court is  
22 biased one way or the other. And I think the results have  
23 spoken for themselves. So if we're going to go around  
24 making statements, there is a complete record before this  
25 court regarding the history of the PBMs. That's number 1.

1           Number 2 is it seems a little disingenuous to raise  
2           this issue now given that the PBMs have prevailed on their  
3           process. The plaintiffs in the PEC proposed a process that  
4           is tried and trued, that has been used with the  
5           manufacturers, with the distributors, with the dispensers,  
6           and that includes amending bellwethers. And not just from  
7           the core group or the named plaintiffs or the name -- the  
8           cases of named defendants. The specific case that you're  
9           referencing is a case where a defendant got added under this  
10          process and filed a writ to the Sixth Circuit, and that  
11          order said that your process was proper.

12                   THE COURT: That was my -- right. Okay.

13                   MR. FARRELL: So now we're in a position where  
14          the defendants, the PBMs -- pardon my colloquialism -- have  
15          thrown a fit, and now we've reverted back to a narrower  
16          process that the PEC is going to have to absorb, quite  
17          frankly.

18                   We are -- we have been under a stay by your order  
19          since 2019. And so the consequences of a decision limiting  
20          bellwethers to simply the 80, there is going to be a  
21          consequence to this. And I'm not saying this as a threat,  
22          I'm saying it as a practicality and that there are 3,000  
23          cases, and I can represent to the Court that a number of  
24          them are going to pursue the PBMs.

25                   So this process just needs to bear out, and if the

1 PBMs insist on selecting the bellwethers from the 80 and  
2 objecting to the amendment process, then we'll likely have a  
3 year from now some clarity on cases that get filed across  
4 the country, the JPML revisits the issue of the conditional  
5 transfer order, perhaps a new MDL is formed.

6 But I just want it to be pointed out on the record  
7 that defendants are getting what they wanted, and they're  
8 still complaining. And all we want from the PEC is a fair  
9 process, and we believe that going in this direction is  
10 going to have some consequences down the road.

11 THE COURT: All right. Thank you,  
12 Mr. Farrell. That's a good point.

13 The PBMs -- the record is clear the PBMs are getting  
14 what they wanted, which is limiting the bellwether -- pool  
15 of bellwethers to be 80 to a hundred cases that currently  
16 name PBMs, all right? Obviously the plaintiffs are free to  
17 file any new case, they always have been free to file any  
18 new case against one or more defendants anywhere in the  
19 country they want. No one's ever limited that, and they --  
20 that they may do so, but...

21 Well, again, I am -- it's up to Special Master Cohen  
22 whether or not he recuses himself. I'm certainly not going  
23 to request or suggest that he do it. I'm saying so on the  
24 record, so...

25 PBMs are free to -- they have always been free to file

1       whatever they want. And, again, I think they're -- you  
2       know, that's -- free to file whatever -- whatever you choose  
3       to file.

4                       MR. COOPER: Understand, Your Honor.

5               And just for Express Scripts to be clear, we don't  
6       agree with Mr. Farrell's suggestion that we've gotten what  
7       we want here. Our concerns, to be clear, go well beyond the  
8       bellwether selection process and go to the merits. And the  
9       prejudgment of the merits are -- are our perhaps most  
10      serious concern. So --

11                    THE COURT: Well, first of all -- first of  
12      all, just so the record's clear, if there is a trial, a  
13      federal judge is going to be presiding over the trial. If  
14      there are any motions, you know, I rule on -- I'm the one  
15      who's going to rule on them. All right? If there's a  
16      discovery issue, that's referred to Special Master Cohen,  
17      makes his ruling. If the party thinks he's wrong, they  
18      appeal to me. That's been the process for five-and-a-half  
19      years. It's worked very well. And, as I said, I have at  
20      times reversed what he's done or modified it. I look at the  
21      facts and the law. The decision's mine, so...

22               And if -- and I will say categorically if I thought  
23      that anyone -- if Special Master Cohen or anyone working  
24      with him was biased, I wouldn't be using him or her,  
25      obviously. So...

1 All right. So everyone understands the process, and  
2 we'll move forward with these -- with these bellwethers and  
3 start litigating. And, again, I would encourage both sides  
4 to keep your eyes open with what you're seeing. And if the  
5 parties are interested in having any resolution discussions,  
6 I'm always available. And obviously Eric Green has done  
7 yeoman's work with many other defendants in the case, and he  
8 can do so, but that's -- the objective is to learn something  
9 from these bellwethers, the discovery process. If we need  
10 to have the trials, we got the federal judges who know how  
11 to do them.

12 All right. Then unless there's anything else anyone  
13 has, we are adjourned.

14 MR. COOPER: Your Honor, if I may, I have one  
15 other point on the bellwether.

16 Jon Cooper for Express Scripts.

17 THE COURT: Yes.

18 MR. COOPER: Earlier I believe you indicated  
19 that for any of these bellwethers, all other defendants  
20 would be severed, and it would just be against Express  
21 Scripts and Optum. I wanted to know that depending on what  
22 claims are pursued here, Express Scripts would want -- needs  
23 to reserve the right to seek to have additional defendants  
24 in the case if, for example, there are allegations about  
25 pharmacy or dispensing claims or conspiracy claims or things

1       like that, there may be additional defendants we would seek  
2       to add to any bellwether to have it be a fair proceeding.

3                   MR. BOONE:   And this is Brian Boone from  
4       OptumRx.

5                   OptumRx needs to also reserve the same right,  
6       depending --

7                   THE COURT:   All right.   I think -- I think  
8       we've had that.

9                   MR. COOPER:   We discussed that, yes.

10                  THE COURT:   The bellwethers we've had -- I  
11       think the defendants always had that right.   I don't think  
12       they used it, but they had the right.   So I would -- you  
13       know, the defendant always has the right to add in a third  
14       party defendant if -- at least move to do it.   If there's an  
15       objection, I'll deal with it.

16                  But, yeah, sure, you want to bring someone in that you  
17       feel is indispensable, sure.   That's always been the case.

18                  Am I correct from the plaintiffs that that's always  
19       been the case?

20                  I don't think in any of the trials, at least that I've  
21       done, a defendant has, but I know there was discussion in  
22       the pharmacy case about that -- the pharmacies ultimately  
23       opted not to bring anyone in, but they could have.   They  
24       certainly had the right to.   So, sure, either or both the  
25       PBMs, you can move to name a third party defendant or

1 defendants.

2 MR. COOPER: And, Your Honor, just to be  
3 technical about it, some of them may already be defendants,  
4 right? And so my -- part of my point is maybe we need to  
5 have third parties, but some of them may be defendants who  
6 just should just not be severed from the case.

7 So that's just what I wanted to raise.

8 THE COURT: All right. Well, presumptively --  
9 presumptively, Mr. Cooper, they would be severed so that we  
10 have just the two PBMs, but if -- if you think they  
11 shouldn't be severed and they should be left in, I would  
12 hear from you at that point.

13 MR. COOPER: We'll have to see the complaints  
14 that are chosen --

15 (Unreportable crosstalk.)

16 MR. COOPER: -- the bellwethers to understand  
17 that. I don't want to be premature.

18 THE COURT: Well, that --

19 MR. FARRELL: Judge, this is Paul Farrell  
20 again.

21 We've addressed this same issue in every one of the  
22 bellwethers for the past five years, so I'm confident at the  
23 right time --

24 THE COURT: Now, that has never been a  
25 problem. That always was a theoretical possibility, and the



1 plaintiffs understood it. And if it turns out that we need  
2 some of the existing defendants to stay in or some new ones  
3 to be added, so be it. But the idea is to make the case as  
4 streamlined and focused as we can because the key litigants  
5 are the two PBMs that we are trying to do here. But if some  
6 have some other defendants, that's fine.

7 Okay. Thank you for bringing that up.

8 Have a good day, everyone.

9 (Proceedings concluded at 1:07 p.m.)

10  
11  
12 **C E R T I F I C A T E**

13  
14 I certify that the foregoing is a correct transcript  
15 of the record of proceedings in the above-entitled matter  
16 prepared from my stenotype notes.

17 /s/ Gregory S. Mizanin August 31, 2023  
18 GREGORY S. MIZANIN, RDR, CRR DATE